No. 90-360

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

NUCLEAR MANAGEMENT AND RESOURCES COUNCIL, INC.,
Petitioner,

v.

PUBLIC CITIZEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONER

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The federal respondents persuasively demonstrate the manifest error committed by the court below. For present purposes, then, the dispositive question is whether that error warrants this Court's immediate attention. In our view, the court of appeals' decision will have such a substantially disruptive effect on the safe operation of nuclear power plants as to justify review at this time.

1. In opposing the petition for a writ of certiorari, Public Citizen argues principally that this case does not warrant review because the NRC "has made the judgment that it can live with the ruling below without an impairment of its regulatory responsibilities." Pub. Cit. Mem. at 5. The NRC itself, however, is not nearly so sanguine. Most notably, the federal respondents do not oppose the grant of certiorari, as they typically do when they consider an issue unimportant. Indeed, far from

"admi[tting] that it can comply with the court's mandate without sacrificing any of its policy goals" (Pub. Cit. Mem. at 5), the NRC has limited itself to the equivocal declaration that it is "hopeful" a regulatory solution may be devised. Fed. Br. at 11. As we discuss below, whether the Commission possibly can accomplish this objective remains problematic.

In any event, regardless of the regulatory regime the NRC ultimately may adopt, the nuclear industry's present training and accreditation program inevitably will suffer disruption in the interim. Under the Commission's close supervision, the ongoing implementation of (and improvement in) training of critical nuclear power plant personnel has largely relied on industry initiative. That initiative necessarily will be blunted by uncertainty about the status of the controlling regulatory program. At the same time, the value of continuing industry expenditures will remain at risk so long as the state of the regulatory regime is unsettled, a circumstance that can only discourage the investment of additional industry resources for expanded safety efforts. The harm caused by disruption and uncertainty is, of course, especially acute when the safe operation of nuclear power plants is at issue. Immediate review of the judgment below therefore is warranted.

2. Even apart from the irreparable damage caused by delay in settling the status of the industry's training and accreditation program, Public Citizen simply disregards the fundamental question whether a satisfactory regulatory substitute for the Policy Statement can be devised.[1] In short, even were it possible to develop man-

[1] Again, the federal respondents themselves expressed no confidence on this point; they indicated only that "[t]he agency currently is studying ways to issue regulations on employee training that would disrupt the successful industry initiative to the minimum degree possible, and is hopeful that it will be able to comply with the court's mandate while still preserving most of the policy statement's flexibility." Fed. Br. at 11.

datory regulations that preserve the requisite flexibility and encourage appropriate industry initiative, it is unclear that such a regime would satisfy the mandate of the court of appeals. The court below indicated, for example, that the Commission is obligated to "prescribe criteria to which training programs must adhere" (Pet. App. at 2a), and to "create mandatory requirements for civilian nuclear powerplant licensee personnel training programs" (Pet. App. 23a). This language indicates that the court may have had in mind the development of a far more detailed and prescriptive regulatory code than did Judge Williams.

In fact, for reasons explained in the petition, *any* prescriptive regulations in the area of personnel training would undermine, if not destroy, the "successful industry initiative" [2] that the NRC, in its expert judgment, approved and for five years has nurtured. *See* Pet. at 4-5, 19-22. Simply stated, any regulatory substitute for the Policy Statement would mark a return to the NRC's pre-Three Mile Island "preoccupation with regulations,"

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[2] In an attempt to discredit the NRC's claims concerning the Policy Statement's success, Public Citizen cites a 1987 NRC staff evaluation of the industry-developed training program which noted that " 'shortcomings in training are prevalent' " and that " 'training deficiencies and weaknesses have been identified.' " Pub. Cit. Mem. at 3 (quoting SECY 87-121, at 2-3, 4 (May 11, 1987)). Actually, the NRC has informed this Court that the industry program is "highly effective" (Fed. Br. at 6) and "successful" (Fed. Br. at 10). Moreover, the 1987 staff evaluation cited by Public Citizen concluded:

> Significant progress is being made by industry in improving training and implementing the Commission's Policy Statement. . . . Deficiencies of the type identified are to be expected given the magnitude of the effort involved and the difficulty in implementing performance-based concepts by an industry that until recently based training on NRC-specific requirements. . . . *On balance, however, the industry's efforts to date to improve training have been successful.*

SECY 87-121, at 4-5 (May 11, 1987) (emphasis added).

which was criticized by the Kemeny Commission Report —the catalyst for Section 306—as "a negative factor in nuclear safety." *See* Pet. at 4. Public health and safety is not a subject where a second-best approach is acceptable.

3. Rather than come to grips with this issue, Public Citizen contends that review is not warranted because the question here is unlikely to recur in other courts. Pub. Cit. Mem. at 9.[3] But while we agree that a conflict in the circuits regarding this issue will not arise, that circumstance demonstrates the necessity of immediate review by the Court. A conflict is not likely to develop because the decision below purports definitively to settle the Commission's obligation to promulgate regulations. Accordingly, absent review by this Court, the court of appeals' ruling will have a permanent, nationwide effect on a program critical to nuclear safety. As we explained in the petition (*see* Pet. at 13 & n.6)—and as Public Citizen does not deny—that decision also will render nugatory the enormous investment in the development of training and accreditation programs undertaken by the nuclear industry in reliance on the NRC's Policy Statement. *See* Fed. Br. at 10. Public Citizen's argument that review is inappropriate in such a case would preclude this Court's consideration of any decision invalidating an

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[3] Public Citizen also contends that review is inappropriate because "the language used in § 306, if not unique, is at least extremely uncommon." Pub. Cit. Mem. at 9. It is unlikely that Public Citizen seriously advances this contention, since its argument on the merits is based, in large part, on an interpretation of similar language in other statutes. *See* Pub. Cit. Mem. at 7. In any event, this Court has made clear that all statutes must be interpreted on their own terms, explaining that the " 'mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language.' " *Tafflin v. Levitt*, 110 S. Ct. 792, 797 (1990) (quoting *Lou v. Belzberg*, 834 F.2d 730, 797 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988)). That understanding has not, of course, been thought to preclude review of decisions interpreting statutes.

agency's regulatory approach under a specialized statute, no matter how important the issue or manifestly erroneous the decision.

4. Finally, the decision below plainly is erroneous. Public Citizen's argument to the contrary rests on two propositions: that "regulatory guidance" cannot "establish . . . instructional requirements"; and that the assertedly unambiguous term "instructional requirements" trumps the purportedly ambiguous term "regulatory guidance." Pub. Cit. Mem. at 6-7. Both of these propositions are incorrect.

As the petition for a writ of certiorari and the brief for the federal respondents demonstrate, regulatory guidance in the form of the Policy Statement can and does establish instructional requirements for the training of nuclear power plant personnel. *See* Pet. at 17 & n.8; Fed. Br. at 8-9. In concluding otherwise and rejecting the NRC's implementation of Section 306, the court below excised the term "regulatory guidance" from the statute [4] and thereby disregarded the maxim that a statute should be construed so as to give effect to *all* of its language.

Even accepting the court of appeals' view as to the relative clarity of the two statutory terms in question,

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[4] Asserting that the court of appeals did not read the term entirely out of Section 306, Public Citizen states: "Nowhere does the court below forbid the NRC from promulgating 'guidance' or 'guidelines'; it is free to do so provided that the agency *also* imposes enforceable requirements for training and qualifications of power-plant personnel." Pub. Cit. Mem. at 7 (emphasis added). Rather than buttress Public Citizen's assertion, however, the statement illustrates vividly the bankruptcy of Public Citizen's and the court of appeals' reasoning. In short, the argument wholly disregards the disjunctive language of Section 306. Moreover, if guidance cannot "establish . . . instructional requirements," the statute's countenance of regulatory guidance would be mere surplusage; even after issuing regulatory guidance, the NRC would have to take further, different action to comply with Section 306. This illogical reading of the statute is avoided by recognizing that regulatory guidance can, indeed, "establish . . . instructional requirements."

that conclusion should not have been used by the court to impose on the NRC and the regulated public its own interpretation of Section 306. As this Court's opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), makes clear, ambiguity in a statute calls for judicial deference to reasonable agency constructions thereof; it is not a license by which the judiciary can oust such interpretations. The decision below, which gives lip service to *Chevron* by the simple expedient of declaring the Commission's interpretation inconsistent with the statutory language, provides a model for evasion of *Chevron*'s mandate which should not be countenanced.

With respect to the second question presented in this case, the timeliness of Public Citizen's 1989 challenge to the NRC's 1985 Policy Statement, Public Citizen is simply incorrect in contending that the decision below was based on a fact-intensive inquiry. The "facts" [5] recounted by Public Citizen and assertedly central to the decision below are without legal significance under the "ever-present duty" test concocted by the court of appeals. Under that test, the most minor adjustment of *any* regulatory program or policy can serve as the basis for renewed judicial review of all decisions connected with that program or policy, no matter how remote from the new

[5] Public Citizen misstates the development and history of the 1985 Policy Statement. The most perfunctory review of the NRC's 1985 and 1988 issuances reveals the following: (1) the Policy Statement was by no means temporary; even in the absence of any further NRC action regarding nuclear power plant personnel training, the Policy Statement would remain effective today; (2) the vitality of the Policy Statement was (and remains) contingent upon practical considerations of its success in contributing to the safety of nuclear power plants, *not* on a renewed determination of its lawfulness; (3) in issuing the three minor amendments to the Policy Statement, the NRC did not republish the Policy Statement or address in any manner its 1985 decision that regulatory guidance in the form of the Policy Statement satisfied Section 306. *See* Pet. App. at 27a-34a, 35a-39a.

change those decisions may be. This expansion of the court of appeals' conception of its jurisdiction to review administrative decisions constitutes a radical and dangerous break with precedent and deserves review by this Court. *See* Pet. at 22-28; Fed. Br. at 6-7 & n.2.

CONCLUSION

For the foregoing reasons, and for those set forth in the petition, petitioner respectfully requests that a writ of certiorari issue in this case to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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